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# IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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| *THE PEOPLE OF THE STATE OF CALIFORNIA,*<br>*PLAINTIFF AND RESPONDENT,*<br>*VS.*<br>*ALEJANDRO AVILA*<br>*DEFENDANT AND APPELLANT.* | CASE NO. S135855<br>**CAPITAL CASE** |

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF CALIFORNIA,

COUNTY OF ORANGE (CASE NO. 02CF1862)

THE HONORABLE WILLIAM R. FROEBERG, JUDGE

# APPELLANT'S REPLY BRIEF



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UNDER APPOINTMENT BY THE
CALIFORNIA SUPREME COURT

ATTORNEY FOR APPELLANT ALEJANDRO AVILA

DEATH PENALTY

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| *THE PEOPLE OF THE STATE OF CALIFORNIA,*<br>*PLAINTIFF AND RESPONDENT,*<br>*VS.*<br>*ALEJANDRO AVILA*<br>*DEFENDANT AND APPELLANT* | CASE NO. S135855 |

## APPELLANT'S REPLY BRIEF

## INTRODUCTION

Defendant and Appellant Alejandro Avila hereby replies to certain points made by Respondent. Appellant Avila believes that a further discussion of these points will be helpful to the Court in deciding the issues presented. Appellant's failure to discuss any particular point means only that he has concluded that no further discussion is necessary and should not be misconstrued as an abandonment, waiver, or concession. (*People v. Hill* (1992) 3 Cal. 4th 959, 995, footnote 3)

# ARGUMENT

## I. THE TRIAL COURT'S REFUSAL TO GRANT A CHANGE OF VENUE DEPRIVED APPELLANT OF ANY REASONABLE LIKELIHOOD OF A FAIR TRIAL AND PENALTY DETERMINATION

Respondent asserts there was no reasonable likelihood that Appellant Avila could not receive a fair trial in Orange County despite the unprecedented unfair and inflammatory pre-trial publicity in this child abduction-molestation-murder case, the preconceived opinions of Orange County prospective jurors that Appellant was guilty and deserved to die, and the relentless efforts of radio "shock jocks" Ken and John to taint the jury selection process. Consequently, Respondent asserts, the trial court properly denied Appellant's repeated motions for a change of venue and his constitutional rights were not violated. (RB 20-32) Respondent's assertions are unpersuasive.

### A. Prejudice Must Be Presumed in this Extraordinary Case

Respondent concedes that there are cases in which it is impossible to select an impartial jury in a county saturated with prejudicial media publicity about the crimes and inflamed against the accused. Respondent further concedes that, under these circumstances, jurors' assurances of impartiality cannot be trusted, a change of venue is constitutionally required, and an affirmative showing of

actual juror bias is not necessary in order to obtain appellate relief. (RB 29; *People v. Prince* (2007) 40 Cal. 4th 1179, 1216-1218; *Rideau v. Louisiana* (1963) 373 U.S. 723)

As discussed more fully in the Appellant's Opening Brief, the instant case is such a case. Five-year-old victim Samantha Runnion was abducted while playing in front of her home, taken to a remote mountain area, and sexually molested and murdered. Her funeral service, held in Orange County's famed Crystal Cathedral, was attended by thousands of residents and broadcast on national television. She was dubbed by Orange County officials as "our little girl" and a large shrine was erected in her honor. Appellant Avila was repeatedly vilified by the Orange County media as a serial rapist and pedophile, wrongfully acquitted of previous molestations, who was guilty of the current offenses, and who posed a deadly menace to children. Hundreds of county residents wrote letters demanding that he be put to death. A public opinion survey revealed that a large majority of the community was convinced of his guilt and that he deserved the death penalty, based solely upon what they had read and heard, before jury selection commenced.

From the onset of the case through jury selection, popular radio commentators Ken and John, by their own admission, were doing everything in their power to taint, pollute, and contaminate the jury pool. They

communicated directly with prospective jurors via email and telephone, in violation of the trial court's order. They invited their listeners to call in and broadcast their strong opinions that Avila was guilty and should die an excruciating death. And, they were urging their radio listeners, if summoned as prospective jurors and assigned to the *Avila* case, to lie under oath, claim they never heard of the case, give false assurances of impartiality, get selected, find Mr. Avila guilty, and give him the death penalty which he deserved. (See transcripts of radio broadcasts appended to second defense Motion For Change of Venue at 46 CT 12234-12283)

Typical of the statements made are the following:

John: "Yeah, that Avila is guilty and, . . . brutally, . . . murdered, . . . Samantha Runnion, . . . " (46 CT 12235)

Ken: "And then, later, was accused of child molestation in a separate case . . ." (46 CT 12235)

Ken: "You know what'd be great? You know what I'd love? Is to have a John and Ken stealth juror . . .to make it . . . Somebody who listens to us all the time . . ." (46 CT 12239-12240)

John: "But if he's . . . Convicted, it could be thrown out on appeal." (46 CT 12240)

Ken: "Only if they find out. . ." (46 CT 12240)

John: "No, that . . . guy's gotta go down. That guy's gotta go down because . . . when you hear the details . . . and you hear the

evidence they have and the DNA . . . it is . . . just so disgusting, so revolting . . .and he already got away once on those child molestation charges out in Riverside. He's not gonna get away again . . ." (46 CT 12240-12241)

John: ". . . Denise Gragg is the Assistant Public Defender in Orange County and she has chosen. . . as her course in life. . . to try to get Alejandro Avila off . . . although he's been charged with kidnapping . . . sexual abuse and murder. And Denise Gragg thinks this guy oughta be back on the streets so he can kidnap some other little 5 year-old girl. . . rape 'em . . . or sexually abuse them in some way . . . and then kill 'em . . . and leave their naked body lying in the sun. She thinks that's a good thing . . . and she gets angry because . . . Ken and I think that's not a good thing . . . [sound effect] . . . the presumption of innocence is only in the courtroom . . . But outside that courtroom . . . we can believe and say anything we wanna believe and say . . . and I can express that on the radio . . . I really can . . . I think Alejandro Avila . . . murdered . . . sexually assaulted, kidnapped Samantha Runnion. I can say it all day, all night, and there's nobody in the government and nobody in law enforcement . . . no where can stop me." (46 CT 12260-12261)

John: ". . . I think . . . beyond a reasonable doubt Alejandro Avila is guilty of killing Samantha Runnion . . . and I say this before the trial [sound effect] . . . and what are you gonna to do about it . . . [sound effect] . . . [laughing] . . . (46 CT 12265)

Brie: [telephone caller] "Hi, my name is Brie and I believe . . . that Alejandro Avila, murderer and sexual predator is guilty, guilty, guilty . . . of [sound effect] . . . kidnapping and murdering and sexually abusing Samantha Runnion and he should be put to death. She deserved her right to life and he deserves a right to die 'cause he's guilty, guilty, guilty!" (46 CT 12268)

John: ". . . thank you for contaminating the jury pool, Brie." (46 CT 12268)

Kendra: [telephone caller] "Hi. Yes. I think you provided a unique opportunity here. I live in Orange County and . . . I wanna make sure I don't end up on this gruesome case . . . and, so, I try to read everything I can about this Mr. Avila guy and I think he's guilty as sin." (46 CT 12277)

John : "You know what I wish . . . I wish the people who . . . feel this way would somehow . . . sneak their way into the jury pool . . and what you have . . . to do is that you fake it and pretend you don't know anything about the case and then you get on . . . the jury and you 'lie in weight' (*sic*) and then you . . . push for the guilty verdict in the jury room. So, . . . that's my purpose here is to infiltrate the jury . . . with tainted jurors." (46 CT 12277)

Tony: [telephone caller] ". . . I am a law enforcement officer with a major police department in Southern California . . . and I'm very familiar with the case because, as I was getting ready to expect the birth of my first daughter . . . this S.O.B. murdered, raped, and killed this poor little girl. So, I'm hopin' to render my expert

opinion as a sworn law enforcement officer and detective, that he is absolutely, positively, 100% guilty . . . well, they won't take me 'cause I'm a cop, but I'm hopin' they take my wife or family member and I'll do everything I can to . . . coach them on how to get on the jury. . ." (46 CT 12278)

John: "**Well, remember, you can't mention that you listened to this show 'cause they'll . . . throw you out immediately**." (46 CT 12278-12279)

Tony: "Oh, no no. . . . Well, I'll tell everybody out there, the guy is guilty. No ifs, ands, or buts and I am an expert opinion on this. So, I hope I've done my part to pollute the jury pool." (46 CT 12279)

Laura: [telephone caller] ". . . I am very passionate about this case 'cause I had a 5 year-old curly haired daughter at the same time this happened . . . and I want that bastard to remember when he grabbed her how she cried for her mom and her grandma [crying] . . . and he killed her. There's nothing that I don't think anybody could do that would be bad enough or mean enough to do what he did to that little girl." (46 CT 12281-12282)

John: "Laura, say his name." (46 CT 12281)

Laura: "Samantha Runnion . . . and Avila." (46 CT 12282)

John: "There you go [sound effect]. Alright. Now, you've . . . officially tainted the jury pool. Thank you." (46 CT 12282)

Joanne: [telephone caller] "I wanted to say Alejandro Avila is guilty of murder . . . [sound effect] . . . not of killing, but of torture and

murdering little Samantha Runnion . . . and it's too bad California doesn't have the electric chair any more . . . 'cause that's what he deserves. I believe that . . . it should be televised . . . giving him the needle, the shot, is too good for him. He deserves the electric chair. (46 CT 12282)

John: "Well, thanks very much. I just hope Denise Gragg is listening." (46 CT 12282)

Mike 2: [telephone caller] ". . . I just wanna tell you that, as a law enforcement officer . . . Alejandro Avila, murderers like him . . . when they do stuff to Samantha Runnion and girls . . . victims like that just makes me wish that, instead of takin' 'em to jail. we could drive them out to the desert some place . . . put a bullet in 'em and leave 'em for coyote's food." (46 CT 12283)

John: "**All right . . . and you made a stronger case now for Denise Gragg to have this moved out of Orange County.**" (46 CT 12283)

To believe that a fair and impartial jury trial was possible in Orange County in such an atmosphere is to ignore reality and live in a dream world.

Respondent's reliance on other high profile cases in which denials of changes of venue have been upheld is misplaced.

*Skilling v. United States* (2011) ____U.S.____ [130 S. Ct. 2896, 177 L. Ed. 2nd 619] involved a financial fraud perpetrated by Enron executives and the victims

were upset that they had been cheated. Avila's case involved the kidnapping, sexual molestation, and murder of a little five-year-old girl which resulted in hysterical demands for the Defendant's death. As this Court has recognized, sexual child murders are particularly likely to have the "sensational overtones" necessitating a change of venue. (*People v. Green* (1980) 27 Cal. 3rd 1, 46) Contrary to Respondent, the nature of the crimes and the emotions aroused in the local community makes a huge difference in determining whether or not jurors can remain untouched by pervasive pre-trial publicity, and whether or not their assurances that they can be fair should be accepted at face value.

Respondent relies heavily on *People v. Famalaro* (2011) 52 Cal. 4th 1, another Orange County abduction, sexual molestation, murder case, tried ten years before Avila's, in which this Court upheld a denial of a change of venue. However, in *Famalaro*, the media coverage at the time of trial was generally factual and contained no inadmissible or prejudicial material. (*Famalaro, supra,* 52 Cal. 4th 22-23).[1] In this case, in dramatic contrast, public passions were re-inflamed on the eve of trial **and during jury selection** by the vitriolic radio broadcasts of Ken and John and their uniquely prejudicial last-minute campaign to taint the jury selection process and impanel "stealth jurors," secretly

[1] Some reports did mention that the victim's parents wanted a death sentence.

committed to convicting Avila and sentencing him to death. The capacity of radio broadcasters to incite and exploit the listeners' emotions and desire to exact revenge against those they perceive as a threat to society by any and all means necessary has been well documented.[2] Respondent barely mentions Ken and John (at RB 22) and fails to explain why, in view of what they did, it "makes good sense" (or indeed any sense) to rely on the jury selection process to weed out problematic or biased jurors.

The lack of other available remedies also distinguishes this case from cases like *Famalaro* and weighed heavily in favor of a change of venue.

Respondent acknowledges that in Appellant Avila's case, unlike in *Famalaro,* the trial court refused to allow the defense additional peremptory challenges to eliminate six jurors who had been exposed to the extensive inflammatory publicity, who were particularly unlikely to be able to overcome their pre-conceived prejudices, and who the defense remained convinced could not give Avila a fair trial. The refusal to allow the defense to excuse these jurors exacerbated the trial court's refusal to grant a change of venue and substantially

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[2] One need only recall Joseph Goebbels' anti-Semitic radio broadcasts of the 1930s. Another tragic example of the power of radio was the Rwandan genocide which was largely kicked off by a series of radio broadcasts advocating Hutu violence against Tutsis. Three of the Rwandan broadcasters were subsequently convicted of aiding genocide in later United Nations war crimes tribunals. (news.bbc.co.uk/2/hi/africa/3257748.stm; Jamie F. Metzl, Rwandan Genocide and the International Law of Radio Jamming, 91 AMJIL 628, 629 (1997))

increased the likelihood Appellant would not receive a fair trial.

Respondent suggests Appellant should have requested a further continuance to allow the media frenzy and passions to subside. (Cf. *Sheppard v. Maxwell* (1966) 384 U.S. 333, 363 ["where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates or transfer it to another county not so permeated with publicity"]) Had Appellant done this, Respondent claims, a change of venue might have been unnecessary. Not so.

The trial had been repeatedly continued and jury selection did not commence until almost three years after the offenses were committed. And yet, the passage of time proved an ineffective safeguard because of the campaign waged by the "Shock-Jocks" Ken and John during jury selection to deny Appellant a fair trial and to ensure his death. Radio Shock-Jocks are by definition sensationalists. A further continuance would simply have provided Ken and John additional opportunity to taint the jury-selection process.

Respondent also relies on *People v. Bonin* (1988) 46 Cal. 3rd 659, the "Freeway Killings" case. Mr. Bonin was convicted of multiple murders in separate trials, the first in Los Angeles County, the second in Orange County. A substantial amount of time elapsed between the two trials. This Court upheld

the denial of a defense motion for a change of venue and additional peremptory challenges by the Orange County trial court. However, the circumstances in the *Bonin* case and the instant case are strikingly different. The *Bonin* trial court denied the motion, in large part, because (1) the publicity in Orange County subsequent to the conclusion of the Los Angeles case had been **minimal**; and (2) there were no polls indicating how many Orange County residents had heard about the case or formed any opinions about it. (*Bonin, supra,* 46 Cal. 3rd at 674-675) Here, we have unprecedented massive inflammatory pre-trial publicity in Orange County, polls indicating a large majority of Orange County residents had "convicted" Appellant Avila and decided he deserved to die before the trial commenced, and radio personalities communicating directly with prospective jurors during jury selection in violation of a court order and urging them to lie, get on the jury, and pronounce a death sentence. Contrary to Respondent, the two cases are anything but "comparable."

Respondent acknowledges that in *People v. Davis* (2009) 46 Cal. 4th 539, the notorious Polly Klaas kidnapping, sexual-molestation, child murder case, which is most comparable to Avila's case, this Court upheld the Sonoma County trial court's finding that a fair trial could not be held in Sonoma County and that a change of venue out of Sonoma County and into Santa Clara County was necessary.

Respondent seems to recognize the similarity between Appellant Avila's case and Mr. Davis' case. Respondent does not challenge the necessity of the change of venue out of Sonoma County in *Davis*. Yet, he insists that a change of venue out of Orange County was not necessary in Avila's case. Respondent notes that Mr. Davis made a second unsuccessful change of venue motion in Santa Clara County and complained that the first change of venue to Santa Clara did him no good because the media coverage permeated that county as well and prejudiced the people of that county against him. Respondent, adopting Mr. Davis' argument, reasons by analogy that a change of venue from Orange County to some neighboring county would not have benefitted Avila since the "shining light of publicity" would simply have followed him. (RB 25-26)

This argument, like that made by Mr. Davis and rejected by this Court, is unpersuasive. Changes of venue out of the county where the crimes were committed and into another county in these extraordinary emotional cases do substantially increase the defendant's chances of receiving a fair trial. As this Court explained in *Davis*, it is not the amount of publicity alone, but the passions aroused against the defendant in the county, which determines whether a fair trial can be had. The level of passion in the county where the crimes occurred is generally much greater than in any other county. (*Davis, supra*, 46 Cal. 4th at 569-581)

In *Davis*, the Sonoma County prospective juror surveys and questionnaires indicated a very high level of personal and community involvement with child-victim Polly Klaas and her family and prejudice against her accused killer. Seventy-two percent of Sonoma county residents admitted the case had affected their lives, and a great many had participated in the search for Polly after her abduction, attended or listened to her memorial service, given money to the Polly Klaas Foundation, and/or visited the crime scene. In addition, the majority of residents had decided Davis was guilty before jury selection began. And, during jury selection, despite the court's admonitions, prospective jurors improperly discussed the case and made inflammatory comments about the defendant's guilt and how he should be killed. (*Id.*)

In contrast, in Santa Clara County, the level of personal involvement and the passions aroused against Defendant Davis were far less. Only 26 percent of the residents surveyed said the case had affected their lives, relatively few had listened to Polly's memorial service or visited the crime scene, and only three percent had participated in the search for Polly or given money to the foundation established in her honor. (*Id.*)

Thus, in *Davis*, a change of venue out of Sonoma County was justified. A second change of venue out of Santa Clara County was not.

In Appellant Avila's case, a change of venue out of Orange County, like the change of venue out of Sonoma County in *Davis*, was necessary to protect the defendant's right to a fair trial by an impartial jury. Avila's case, like *Davis*, involved an unprecedented firestorm of publicity in the county where the crimes were committed. The crimes reported in the instant case, like those reported in *Davis*, inflamed the emotions of prospective county jurors and made a fair trial in that county impossible. The similarities between *Davis* and *Avila* are remarkable. The funeral for child-victim Samantha Runnion, "Orange County's little girl," like the funeral of Polly Klaas, was attended by thousands of county residents and watched by many thousands more on television. A Joyful Child Fund, similar to the foundation established in Polly Klaas' name, was set up. The percentage of county residents who assumed in advance Appellant Avila was guilty was higher even than in *Davis*. Furthermore, in Avila's case, as in *Davis*, prospective jurors disregarded the court's admonitions and made inflammatory comments during jury selection about Appellant's guilt.

To be clear, in Appellant Avila's case, as in *Davis*, the visceral emotional involvement of the prospective jurors and the intensity of their feelings about the child-victim's accused murderer was at its zenith in the county where the crimes were committed. There is nothing in this record which indicates the level

of passion and prejudice against Appellant Avila would have been the same if a change of venue out of Orange County had been granted and the case transferred into another county.

Alternatively, assuming for argument's sake that a fair trial in a neighboring Southern California County (*e.g.*, Los Angeles or San Diego County) might not have been possible because of the spill-over effect of the Orange County pre-trial publicity, this just means the case should have been transferred to a county farther away. As this Court has recognized, "in counties geographically removed from the locale of the crime, lack of a sense of community involvement will permit jurors a degree of objectivity unattainable in that locale" and "local consciousness of the community's reputation for peace and security will be eliminated." (*People v. Davis, supra* at 46 Cal. 4th 577, quoting *Corona v. Superior Court* (1972) 24 Cal, App. 3rd 872, at 883.)[3]

Accordingly, this is a case where it must be presumed that it was impossible to select a fair and impartial jury and that a change of venue out of

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[3] Respondent summarily dismisses *Daniels v. Woodford* (9th Circuit 2005) 428 Fed. 3rd 1181, since it is not binding on this Court as a matter of *stare decisis* and is contrary to this Court's earlier decision in the same case. (*i.e.*, *People v. Daniels* (1991) 52 Cal. 3rd 815, 851-853) (RB 25, footnote 16) However, the decisions of intermediate federal appellate courts, while not controlling, may be persuasive. (*Forsyth v. Jones* (1997) 57 Cal. App. 4th 776, 782-783; see also *Rohr Aircraft Corporation v. San Diego* (1959) 51 Cal. 2nd 759, 764) Nothing precludes this Court from reconsidering *Daniels* in light of the federal court's reasoning.

Orange County was constitutionally required, Respondent's arguments notwithstanding.

### B. Appellant Established a Reasonable Likelihood That He Could Not Receive a Fair Trial in Orange County

Contrary to Respondent's assertion, Appellant established a reasonable likelihood that he could not receive a fair trial in Orange County under the five factors analysis traditionally used by this Court.[4]

Respondent recognizes that the first of these factors—the nature and gravity of the offenses—weighed heavily in favor of a change of venue. Appellant was facing the death penalty for kidnapping, sexually molesting, and murdering a child. This is precisely the kind of sensational case that requires a change of venue out of the county where the crimes were committed. (*People v. Green* (1980) 27 Cal. 3rd 1, 46; *People v. Fauber* (1992) 2 Cal. 4th 792, 817-818; *People v. Davis, supra,* 46 Cal. 4th, at 569 *et seq.*)

The second factor, pertaining to the nature and extent of the media coverage, also weighed heavily in favor of a change of venue for the reasons discussed above and in the Appellant's Opening Brief (pages 21-48). Respondent, while he admits there was a "significant amount" of inflammatory

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[4] Respondent falsely asserts that Appellant has conceded that four of the five factors did not warrant a change of venue.(RB 23). Not so. (See AOB 44-48)

pre-trial publicity, points out that the publicity subsided somewhat after Appellant's arrest. However, what Respondent overlooks is that the **effect** of the publicity had not diminished. Indeed, the Orange County public's awareness of what had happened to Samantha and what Avila had allegedly done remained very high more than two years later, with over 86 percent of the potential jury pool still familiar with the case and about 72 percent of these convinced of his guilt, based solely upon what they had read and heard.

Moreover, Respondent fails to address the effect of Ken and John's incendiary radio broadcasts and e-mail and telephone communications with the prospective jurors during jury selection calculated to ensure Avila's death sentence.

Respondent's reliance on the jury selection process to weed out problematic or biased jurors in this case is misplaced for the reasons previously discussed and particularly in light of what Ken and John did during jury selection. It is true that the jurors selected assured the trial court they could be fair and impartial. But it is equally true that this is precisely what they would say if they followed Ken and John's advice—to lie in order to get on the jury and pronounce a death sentence. The trial court had no way of detecting and eliminating these "stealth jurors" and it is at least reasonably likely that some of

them survived the jury selection process and denied Appellant the fair trial he was constitutionally entitled to.

Respondent correctly points out that the third factor—the size of Orange County's population—weighed against a change of venue. However, this Court has held that population **alone** is not determinative. (*Fain v. Superior Court* (1970) 2 Cal. 3rd 46, 52, footnote 1) Moreover, defense counsel's exhaustion of all 20 of her peremptory challenges and request for six additional peremptory challenges indicates she remained deeply concerned about the jurors' fairness and regarded the trial court's hope that an unbiased jury could be selected in Orange County as little more than an exercise in wishful thinking. (Cf. *People v. Daniels, supra,* 52 Cal. 3rd. 854 ["In the absence of some explanation for counsel's failure to utilize his remaining peremptory challenges, or any objection to the jury as finally composed, we conclude that counsel's inaction signifies his recognition that the jury as selected was fair and impartial"]; *People v. Leonard* (2007) 40 Cal. 4th 1370, 1397 [jurors' exposure to pre-trial publicity in "Thrill Killer" case in populous Sacramento County apparently was not of great concern to defense which exercised only 13 of its 20 peremptory challenges and supports trial court's conclusion that unbiased jury could be found])

Respondent acknowledges that the fourth factor—the Appellant's relative

lack of Orange County community ties—was a "neutral" factor which did not weigh heavily for or against a change of venue.

Respondent also admits that the fifth factor—"the victim's posthumous celebrity status—may have favored a change in venue" out of Orange County. Respondent assumes that the problem posed by the child-victim's prominence would have been the same in any county in which "venue ultimately resided." However, this is simply not so. As previously discussed, the emotional involvement of prospective jurors with the child-victims in cases like this is much greater in the county where the child was abducted, molested, and murdered. That was why Richard Davis could never have received a fair trial in Sonoma County where Polly Klaas was murdered, but could get one in Santa Clara County. Similarly, that is why Appellant Avila, the accused murderer of "Orange County's little girl" Samantha Runnion, could not receive a fair trial in Orange County, and was far more likely to receive one in another county.

In sum, three of the five factors—the nature and gravity of the offense, the nature and extent of the media coverage, and the prominence of the victim—weighed heavily in favor of a change of venue, only one factor (the size of the county) weighed somewhat against a change of venue but proved insufficient to ensure a fair trial, and the last factor—the Defendant's relative lack of

community ties—was a neutral factor. There was a reasonable likelihood Appellant could not receive a fair trial in Orange County and a change of venue should have been granted.

### C. Respondent Has Not Established That The Refusal to Grant a Change of Venue Was Harmless Beyond a Reasonable Doubt

Respondent argues that, even if the trial court committed error in denying a change of venue, Appellant Avila is not entitled to a reversal on appeal since he has failed to establish a reasonable likelihood that he was prejudiced; *i.e.*, he did not in fact receive a fair trial. (See *People v. Proctor* (1992) 4 Cal. 4th 499, 523; *People v. Harris* (2013) 57 Cal. 4th 804, 830-831) But, this is the wrong standard.

The refusal to grant a change of venue in a capital case, where there is a reasonable likelihood the defendant cannot receive a fair trial and penalty determination by an impartial jury, violates his Federal constitutional rights. (*Sheppard v. Maxwell, supra*) Federal constitutional errors are subject to federal harmless error analysis under *Chapman v. California* (1967) 386 U.S. 18, 24. The beyond a reasonable doubt standard of *Chapman* requires the prosecution, as the beneficiary of a federal constitutional error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict. (*Yates v. Evans* (1991) 500 U.S. 391, 403) Respondent has not proven beyond a reasonable doubt

that the jurors selected to try this case were somehow able to put aside their preconceived opinions that Appellant Avila was guilty and deserved to die, disregard Ken and John's vicious campaign to ensure Appellant's death, and decide this case based solely on the evidence actually presented. Indeed, the very fact that the jury found Appellant guilty of every crime with which he was charged and found the special circumstances allegations true, even though there were significant weaknesses in the prosecution's case (as discussed at AOB, pages 72-75) tends to show it was prejudiced against him. (Cf. *People v. Harris, supra,* 57 Cal. 4th 831 [Court agrees with Attorney General that jury's failure to convict the defendant of all charged offenses tends to show it was not prejudiced against him, but rather was able to fairly evaluate the evidence presented])

Additionally, it would be inappropriate to require Appellant to prove he was in fact prejudiced by the trial court's refusal to grant a change of venue in this **extraordinary** case where prejudice must be **presumed**.

Accordingly, despite Respondent's arguments, the trial court's adamant refusal to grant a change of venue requires reversal.

## II. THE TRIAL COURT'S FAILURE TO ALLOW ADDITIONAL DEFENSE PEREMPTORY CHALLENGES REQUIRES REVERSAL

Respondent recognizes that a defendant is constitutionally entitled to additional peremptory challenges, over and above the 20 normally allowed by statute in a capital case, if it is likely that in the absence of the additional challenges he cannot receive a fair trial. (*People v. DePriest* (2007) 42 Cal. 4th 1, 23) Respondent, nonetheless, asserts the trial court properly denied Appellant Avila's request for additional peremptory challenges because there was no likelihood of an unfair trial. Respondent's assertion is based upon his view that, despite the unprecedented inflammatory pre-trial publicity and the passions ignited by Samantha Runnion's kidnapping-molestation-murder in Orange County, this case was not so extraordinary that extraordinary remedies like a change of venue or additional peremptory challenges were necessary. (RB 32-36)

Appellant disagrees. For the reasons previously discussed in regard to the change of venue issue, this is precisely the kind of case where extraordinary remedies were essential.

Respondent argues Appellant failed to avail himself of all of the other remedies available to him and suggests that, had Appellant done so, additional peremptory challenges would have been unnecessary.

This argument is strained and unpersuasive. Appellant repeatedly moved for a change of venue, obtained numerous continuances, challenged prospective jurors whom he believed were biased for cause, and exhausted all of the peremptory challenges he was statutorily entitled to. Respondent contends Appellant should have requested a further "continuance of the trial to further allow the media spotlight to fade." However, once again, the trial had already been continued for nearly three years and the passage of time had proven to be an ineffective remedy due to the relentless and despicable efforts of Ken and John to impanel a biased jury. Again, there is no reason to believe that a further continuance would have deterred Ken and John or increased Appellant's chances of receiving a fair and impartial adjudication based solely on the evidence. Appellant did everything he could reasonably have been expected to. His only remaining available option was to request additional peremptory challenges.

Respondent suggests no additional peremptory challenges were needed since the six jurors Appellant wanted to excuse all stated they could put aside their acknowledged biases and preconceptions and were not excusable for cause. But jurors not excusable for cause are not immune from peremptory challenge. On the contrary, the purpose of peremptory challenges is to get rid of jurors a

party is convinced cannot be fair to him, but whom he has been unable to successfully challenge for cause because they refuse to admit this. The cases cited by Respondent recognize that, where there are a large number of these jurors, the use of additional peremptory challenges is an appropriate remedy. They hold only that, before requesting additional peremptory challenges, the defendant must first attempt to excuse such jurors by challenging them for cause, exhaust his statutorily authorized peremptory challenges, advise the court of his continued dissatisfaction with the jury, and explain why there is a reasonable likelihood that the additional jurors he wishes to excuse will be unable to give him a fair trial. (*People v. Bittaker* (1989) 48 Cal. 3rd 1046, 1087-1088, *People v. Yeoman* (2003) 31 Cal. 4th 93, 118-119) Since Appellant did all of these things (see AOB 49-51), Respondent's argument fails.

Contrary to Respondent, Appellant did not have to prove that the six jurors he sought to excuse actually lied or deliberately misled the court about their ability to be impartial. All he needed to establish, and did establish, was that it was reasonably likely they could not give Appellant a fair trial in light of, not only their exposure to the inflammatory publicity, but **also** their personal identification with the victim and her mother and their sympathy with close friends and relatives who had been victims of sexual assaults. Respondent never

explains how jurors like these could be objective nor why the defense should not have been permitted to excuse them by peremptory challenge.

Respondent's contention that Appellant has failed to establish he was actually prejudiced by the denial of the additional peremptory challenges precludes appellate relief is without merit for the same reasons as his similar contention in regard to the denial of the change of venue. (See Argument I-C, *ante*) Appellant has established a reasonable likelihood that six of the twelve jurors who found him guilty and sentenced him to death were incapable of judging him fairly, based solely upon the evidence presented in the courtroom and that his federal constitutional rights were violated. Respondent has not proven beyond a reasonable doubt that the prejudices and preconceived opinions of these jurors did not affect the jury's verdicts as required under *Chapman v. California, supra.*

Despite Respondent's objections, the trial court's error in disallowing additional peremptory challenges, especially when coupled with that court's refusal to grant a change of venue, requires that the judgment be reversed.

## III. THE TRIAL COURT DEPRIVED APPELLANT OF A FUNDAMENTALLY FAIR TRIAL AND PENALTY DETERMINATION BY ADMITTING EVIDENCE HE HAD PREVIOUSLY MOLESTED OTHER CHILDREN

Respondent contends the trial court properly admitted evidence Appellant Avila molested other children, during both the guilt and penalty phase trials, pursuant to Evidence Code sections 1101, 1108, and 352 and Penal Code section 190.3, subdivisions (a) and (b). According to Respondent, this evidence was relevant and did not create any substantial danger of undue prejudice. (RB 36-49) This argument is unsupportable.

Respondent, abandoning the prosecution's position in the trial court, all but concedes that during the guilt phase trial the other offenses were not admissible to prove Appellant Avila's identity as the perpetrator of the charged offenses involving Samantha Runnion under Evidence Code section 1101. Respondent does not assert that the charged and uncharged crimes shared common features that were so unusual and distinctive as to be like a signature. (*People v. Ewoldt* (1994) 7 Cal. 4th 380, 403; *People v. Vines* (2011) 51 Cal. 4th 830, 856; *People v. Edwards* (2013) 57 Cal. 4th 658, 710-712) Instead Respondent states that this Court need not decide this issue since the evidence was admissible for other reasons. (RB 44, footnote 20)

Respondent argues the prior offenses were admissible under section 1101

and *Ewoldt, supra,* to show that Appellant Avila probably harbored an intent to molest a young blond girl. However, according to Respondent, the young blond girl who Avila was supposedly attracted to, believed he was free to molest again with impunity after the previous acquittals, and expected to find at the Smoketree Condominium complex was Catherine Coker (Lizabeth Veglahn's daughter), not Samantha Runnion. (RB 44-46)

Respondent further undermines his argument by admitting that the prior offenses involving Catherine were dissimilar from those perpetrated against Samantha in many ways. For example, Catherine, unlike Samantha, was not abducted in broad daylight while playing outside her home and the offenses Appellant was found not guilty of committing against Catherine were far less brutal than those perpetrated upon Samantha. *(Id.)*

Respondent theorizes that Appellant Avila might have decided to "prey" upon Samantha in the hope she might recognize him from his previous visits and not be on her guard. Respondent also hypothesizes that Avila later decided to kill Samantha since he perhaps realized his alleged threat to kill Catherine if she reported his transgressions had been unavailing and feared he might be caught. *(Id.)* But all of this is mere speculation and is not based upon the evidence or any reasonable inferences drawn therefrom.

The Catherine Coker offenses were not sufficiently similar to the Samantha Runnion offenses to be admissible to prove intent, and this is especially true since the intent of Samantha's assailant was never disputed.

Respondent argues that, even if not admissible under section 1101, the prior offense evidence was admissible as propensity evidence under section 1108 and *People v. Falsetta* (1999) 21 Cal. 4th 903, 915. However, as Respondent acknowledges, this is true **only** if the limited probative value of this evidence was not outweighed by the danger of undue prejudice in the minds of the jurors. (RB 46-48)

As explained in the Opening Brief, the undue prejudice in this case was enormous in view of the jury's exposure to the unprecedented publicity portraying Appellant as a habitual pedophile and the continual disparagement of the jurors who had acquitted him of the previous molestations as "vegetables" and "idiots" by Ken and John. This is precisely the kind of case where the jury would find the temptation to convict the defendant of the charged offenses, regardless of his guilt, in order to assure that he would be punished for the previous crimes irresistible. (*People v. Ewoldt, supra,* 7 Cal. 4th 405; *cf. People v. Balcom* (1994) 7 Cal. 4th 414, 427 and *People v. Edwards, supra,* 57 Cal. 4th 713)

Respondent naively asserts that, despite this, the jury would somehow be able to disregard or limit their consideration of this evidence just because the trial court instructed them to do so. But Respondent fails to tell us how this would be humanly possible. As one of our greatest jurists has written: "The naive assumption that prejudicial effects can be overcome by an instruction to the jury [citation] all lawyers know to be an unmitigated fiction." (*Krulewitch v. United States* (1949) 336 U.S. 440, at 449, Mr. Justice Jackson concurring)

Respondent seems to be suggesting that, assuming the evidence was legally sufficient to support the jury's verdicts, this necessarily means it was so conclusive Avila would have been convicted as charged even in the absence of the prior crimes testimony. (RB 47-48) If so, Respondent is badly confused. In any event, for the reasons discussed in the Opening Brief (at AOB 72-75), the evidence against Avila was not as conclusive as Respondent believes and the introduction of the alleged prior crimes evidence during the guilt phase trial was anything but harmless. For example, Respondent ignores the curious fact that Samantha was never seen in Avila's car in the hours which elapsed between her abduction and demise while he presumably was driving with her all over Southern California. The best Respondent can do is describe Avila's movements and whereabouts as "unusual" and "suspicious." Or, to take another example,

while Respondent is quick to point out that Samantha's DNA was later found in Avila's car, he does not mention that it was not found the first time the car was carefully searched by a notably experienced forensic expert, and somehow magically appeared only after the expert's superiors insisted she search the car a second time.

The introduction of the prior crimes evidence into the penalty phase was both erroneous and prejudicial.

Contrary to Respondent, none of the previous incidents could be considered as factor (a) evidence since they were not relevant to provide "insight" into Appellant Avila's state of mind at the time of Samantha's murder, 18 months after he was acquitted. As discussed above, the supposed relevancy was based purely on prosecutorial speculation rather than any evidence. Respondent acknowledges that the jury could not consider the incidents involving Catherine and Alexis as factor (b) evidence since Appellant Avila had been acquitted of them (*People v. Heishman* (1988) 45 Cal. 3rd 147; *People v. Lewis & Oliver* (2006) 39 Cal. 4th 970, 1052), but the prosecutor nonetheless made "limited" references to these incidents anyway. (RB 41)

It is true the trial court instructed the jury that, before they could consider the evidence of other alleged criminal molestations as an aggravating

circumstance, they had to find these crimes were committed beyond a reasonable doubt. However, the jury should never have heard this evidence.

For the reasons already discussed, the evidence regarding Catherine, Alexis, and Cara was enormously prejudicial and made a fair penalty determination impossible. Again, while the jury might have unanimously concluded that Appellant should be put to death based upon the aggravated nature of the offenses and the pain experienced by her family, this is not a foregone conclusion. The defense presented abundant mitigating evidence and some or all of the jurors might have decided to spare Appellant's life had they not heard about the prior alleged molestations.

Consequently, while Respondent struggles mightily to persuade this Court otherwise, Appellant is entitled to a reversal of the entire judgment or, at the very least, a new penalty trial.

## IV. THE TRIAL COURT DEPRIVED APPELLANT OF A FUNDAMENTALLY FAIR TRIAL AND PENALTY DETERMINATION BY ADMITTING INFLAMMATORY PHOTOGRAPHS OF THE VICTIM'S BODY AND TESTIMONY DESCRIBING "DISGUSTING" PORNOGRAPHY FOUND ON THE AVILA FAMILY COMPUTER

Appellant Avila is confident that this issue has been—for the most part—adequately briefed (see AOB 77-88; RB 49-55), that most of Respondent's arguments were anticipated and replied to in the Opening Brief, and that no purpose would be served by simply repeating those same points here verbatim. Suffice it to say that, while Respondent argues at length that the photographs and pornography were relevant to help the jury understand the savage manner in which Samantha Runnion was assaulted and murdered and her body discarded and Appellant's sexual attraction to young girls, their real purpose was to inflame the jury against Avila as a depraved "animal" who needed to be exterminated.

Contrary to Respondent, Appellant is **not** arguing that **all** autopsy and crime scene photographs should be excluded as a matter of law in every capital case merely because they are unpleasant. But in this case there was clearly no legitimate reason to show the jury close-up photographs of the child-victim's naked body with legs spread and bleeding sex organs. Similarly, there was no legitimate reason why the jury had to know about an adult man engaging in sexual activities with his granddaughters when Avila was not accused of incest.

## V. THE JURY'S CONSIDERATION OF UNDULY PREJUDICIAL VICTIM IMPACT EVIDENCE DEPRIVED APPELLANT OF A FUNDAMENTALLY FAIR PENALTY DETERMINATION

Respondent recognizes that victim impact evidence is admissible only if it is not so unduly prejudicial that it is likely to elicit an irrational emotional response and deprive the defendant of a fair penalty determination. (*People v. Taylor* (2010) 48 Cal. 4th 574, 645-646; *People v. Edwards* (1991) 54 Cal. 3rd 787, 836) Respondent also recognizes that showing the jury photographs of Samantha dressed as an angel, coupled with her widely publicized adoption as "our little girl," was likely to provoke an emotional response. However, Respondent insists that victim impact evidence cannot be limited and tailored in light of the local community's predictable visceral response to a child murder. (RB 55-58)

This argument makes no sense. The reason for limiting this kind of victim impact evidence is to ensure that the local community's emotional response does not so inflame the jurors chosen from that community that a rational penalty determination becomes impossible. Indeed, Respondent points out that this is precisely the kind of photographic emotional tribute to the victim this Court cautioned against in *People v. Prince* (2007) 40 Cal. 4th 1179, at 1286-1291). The fact that the victim impact evidence, independent of the photographs at issue, may have been less extensive than in other cases does not change the analysis.

## VI. THE TRIAL COURT'S ERRORS WERE CUMULATIVELY PREJUDICIAL

Appellant Avila has argued that the denial of a change of venue, the refusal to allow him additional peremptory challenges, and the admission of inflammatory photographs and pornography, as well as evidence of other crimes, considered cumulatively, deprived him of the fair trial and penalty determination to which he was constitutionally entitled. (AOB 95-96)

Respondent argues Avila received a fundamentally fair and untainted trial, even assuming it may not have been "perfect" or error free. According to Respondent, any errors were harmless. (RB 58-59)

While this issue has been adequately briefed, Appellant Avila wishes to emphasize that the state's thinly veiled purpose in this case, beginning with Sheriff Corona's statements and concluding with the prosecutor's impassioned penalty phase argument, was to overcome the jurors' reason and to ensure emotionally driven guilty and death penalty verdicts. Appellant submits that a judgement rendered under such circumstances cannot stand.

## VII. CALIFORNIA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL

Respondent argues that California's death penalty law, as interpreted by this Court, is constitutional and that there is no reason for this Court to

reconsider its previous decisions. (RB 59-66)

Appellant disagrees for all of the reasons stated in his Opening Brief. (see AOB 97-142) Appellant believes this issue has been adequately briefed, especially in light of *People v. Schmeck* (2005) 37 Cal. 4th 240, at 304, and that no further discussion is warranted.

## CONCLUSION

For each and all of the reasons, as well as for all of the reasons stated in the Appellant's Opening Brief, the judgment of conviction, the jury's special circumstances finding, and the death sentence should be reversed.

NOVEMBER 15, 2013

RESPECTFULLY SUBMITTED,

JONATHAN P. MILBERG

ATTORNEY FOR APPELLANT ALEJANDRO AVILA

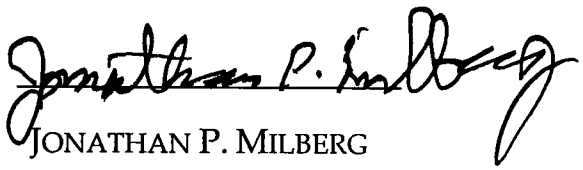
## CERTIFICATE OF COMPLIANCE

(*People v. Alejandro Avila*, California Supreme Court Case No. S135855)

I, Jonathan Milberg, hereby certify, pursuant to Rule 8.630, subdivision (b) of the California Rules of Court, that the foregoing Appellant's Reply Brief contains 7,802 words as counted by the Corel WordPerfect, Version 8 application, and does not exceed 140 pages.

November 15, 2013

Respectfully submitted,



JONATHAN P. MILBERG

## DECLARATION OF SERVICE BY U.S. MAIL

(*People v. Alejandro Avila*, California Supreme Court Case No. S135855)

I, the undersigned, state that I am a citizen of the United States employed in the County of Los Angeles, that I am over the age of 18 years and not a party to this action. My business is 225 South Lake Avenue, 3rd Floor, Pasadena, California 91101.

On November 15, 2013, I served the foregoing:

**APPELLANT'S REPLY BRIEF**

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Pasadena, California, addressed as follows:

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Santa Ana, CA 92701

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this Declaration was executed on November 15, 2013, at Pasadena, California.

JONATHAN P. MILBERG

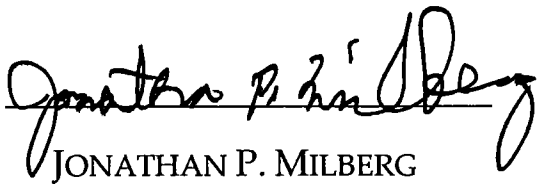
# DECLARATION OF JONATHAN P. MILBERG

I, Jonathan P. Milberg, hereby declare:

I am the attorney of record for the Defendant and Appellant in *People v. Alejandro Avila*, California Supreme Court Case No. S135855, a death-penalty case.

I will personally serve the Defendant with a copy of the Appellant's Reply Brief on or before December 15, 2013, and shall notify the Court thereafter in writing that the Defendant has been served, pursuant to Policy Statement 4.

I hereby declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct and that this Declaration was executed at Pasadena, California on November 15, 2013.



JONATHAN P. MILBERG